



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC

Issued by the Department of Transportation
on the 21st day of July, 2004

Served: July 21, 2004

In the matter of

U.S.-Israel Third-Country
Code-Share Opportunity

Docket OST-2003-15993

FINAL ORDER

SUMMARY

By this order we make final our tentative decision to select US Airways to operate third-country code-share service via Frankfurt with Lufthansa in the U.S.-Israel market.

BACKGROUND

Under a Memorandum of Consultations (MOC) signed January 10, 2001, representatives of the United States and Israel reached an *ad referendum* agreement on the text of a Protocol amending the 1950 U.S.-Israel Air Transport Agreement, as amended. Under the terms of the Protocol, U.S. carrier opportunities were expanded to permit the operation of up to four code-share arrangements with third-country airlines for services in the U.S.-Israel market on a phased-in basis as follows: Phase 1 – up to two arrangements until March 31, 2002; Phase 2 – up to three arrangements from April 1, 2002, through March 31, 2003; and Phase 3 – up to four arrangements from April 1, 2003, through March 31, 2004.¹ The Protocol provides that, until March 31, 2004, designated U.S. airlines may serve Tel Aviv, plus seven additional points to be selected by the United States on a code-share basis only, without local traffic rights between third-country points and points in Israel when the U.S. airline is not the operating carrier.²

¹ The Protocol, which has been extended through March 31, 2005, provides that the frequency of such code-share operation shall be limited only by the number of frequencies that the operating airline is entitled to use on the relevant segments, consistent with relevant bilateral agreements.

² Selection of points to be served on a code-share basis only may be made or changed with 30 days' notice to the Government of Israel.

We have already awarded authority for Phases 1 and 2. By Notice dated August 22, 2003, we requested that all U.S. air carriers interested in making use of the Phase 3 third-country code-share opportunity described above file applications with the Department. Four carriers—American Airlines, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., and US Airways, Inc.—applied for the opportunity to serve Israel under code-share arrangements with British Airways, KLM, Alitalia, and Lufthansa, respectively. By Order 2004-3-24, dated March 23, 2004, we tentatively selected US Airways/Lufthansa for the Phase 3 opportunity. We required that objections to our tentative decision be filed by March 30, 2004.

RESPONSES TO ORDER 2004-3-24

Delta Air Lines filed an objection to our tentative decision. US Airways filed an answer to the objection.

Delta opposes the tentative decision and urges the Department to reconsider its findings and conclusions and award the Phase 3 code-share opportunity to Delta in order to implement its proposed Israel code-share service with Alitalia. Delta argues that (1) it would offer six gateways to US Airways' three; (2) Delta's gateways account for nearly 700,000 U.S.-Israel passengers, compared to 6,500 gateway passengers for US Airways; and (3) Delta offers shorter connecting schedules and elapsed round-trip travel times.

US Airways maintains that Delta simply restates the arguments it has already made and that the Department has already considered these arguments. US Airways states that Delta selectively cites its most favorable proposed routes, whereas US Airways' overall elapsed times are not significantly different from those of Delta. US Airways further states that Delta fails to address the fact that even though its proposed markets are larger, all of the U.S. gateways that Delta would serve have service to Israel now, whether by code sharing or direct service. US Airways argues that Delta's proposed services offer no new nonstop-to-nonstop services to U.S. passengers and shippers because the majority of its proposed services are operated entirely by its code-share partner, Alitalia. US Airways maintains that Delta already has a strong presence in the U.S.-Israel market pursuant to its code-share arrangement with El Al, and that the selection of Delta in this proceeding would undermine the Department's efforts to promote competition among carriers, particularly when limited international routes are involved.

DECISION

We have decided to make final our tentative decision to select US Airways/Lufthansa for the Phase 3 third-country code-share opportunity currently available in the U.S.-Israel market.

The Protocol amending the 1950 U.S.-Israel Air Transport Agreement, as amended, provides valuable opportunities for U.S. carriers to operate code-share services between the United States and Israel. Four U.S. carriers now provide services to Israel, either directly or under various code-share arrangements. The implementation of the next phase of transitional third-country code-share rights under the agreement represents an important opportunity to increase competition in the market and the range of travel options to consumers.

By Order 2004-3-24, we stated our tentative belief that the selection of US Airways constitutes an important opportunity to maximize the number of U.S. carriers serving Israel and the level of competitive services offered, thereby furthering the development of the market. We tentatively found that US Airways would be a new entrant in the market, proposing new U.S. gateway service, thereby holding the promise of offering travelers significantly improved service opportunities. We noted that (1) the other applicants proposed quantitatively more gateways than US Airways, but none of their proposals would achieve the overriding qualitative benefits that we tentatively see as deriving from the new gateway/new entrant services proposed by US Airways; (2) although Delta's proposed markets collectively may be larger, all of the gateways that Delta would serve have service to Israel now, whether by code-sharing or direct online service; and (3) US Airways' overall elapsed times are not significantly different from those of the other applicants,³ and to the extent differences might exist, we tentatively found that they were outweighed by other factors.

Delta has not provided any new arguments or evidence that persuades us to modify our tentative decision. Rather, Delta has reiterated arguments already raised and considered in our show-cause order. Delta essentially asserts the benefits of its own proposal. However, in our tentative decision we expressly acknowledged that "While the proposals of the other three applicants would provide public benefits, we tentatively do not believe that those benefits outweigh the important positive elements of US Airways' proposal." Order 2004-3-24 at 5. Having reviewed the record in light of Delta's objections, this remains our position. Thus, in the circumstances presented, we find that grant to US Airways of the exemption authority described herein is consistent with the public interest.

ECONOMIC AUTHORITY

We will grant US Airways the requested exemption authority to serve the U.S.-Israel market via Frankfurt in order to conduct the authorized third-country code-share service

³ For example, the overall elapsed time for US Airways' Pittsburgh-Tel Aviv service is 31 hours and 35 minutes, for its Charlotte-Tel Aviv service, 32 hours and 45 minutes, and for its Philadelphia-Tel Aviv service, 40 hours and 30 minutes. While Delta shows an elapsed time of 28 hours for its Boston-Tel Aviv service, it also shows an elapsed time of 31 hours and 45 minutes for its Newark-Tel Aviv service (via Milan), and 58 hours and 35 minutes for its Atlanta-Tel Aviv service (via Rome).

and grant its request for route integration authority. US Airways holds a blanket statement of authorization for its code-share service with Lufthansa, and has filed the required notice for expansion of its services, subject to the completion of the carrier selection procedures here.

ACCORDINGLY,

1. We make final our tentative decision in Order 2004-3-24 and select US Airways, Inc. to operate third-country code-share services in the U.S.-Israel market under its code-share arrangement with Lufthansa German Airlines;
2. The selection of US Airways, Inc., in ordering paragraph 1 above, is effective immediately;
3. We grant US Airways exemption authority under the provisions of 49 U.S.C. 40109 to the extent necessary to provide scheduled foreign air transportation of persons, property, and mail between points in the United States and Tel Aviv, Israel, and to integrate this authority with its existing certificate and exemption authority;
4. The exemption authority granted in ordering paragraph 3 is effective immediately and shall remain in effect for a period of two years from the date of service of this order, and shall be subject to the standard conditions attached to this order;
5. The route integration authority granted US Airways is subject to the condition that any service provided under this exemption shall be consistent with all applicable agreements between the United States and the foreign countries involved. Furthermore, (a) nothing in the award of the route integration authority requested should be construed as conferring upon US Airways rights (including fifth-freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless US Airways notifies the Department of its intent to serve such a market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights; and (b) should there be a request to use the limited-entry route rights that are included in US Airways' authority by virtue of the route integration exemption granted here, but that are not then being used by US Airways, the holding of such authority by route integration will not be considered as providing any preference for US Airways in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue;
6. We may amend, modify, or revoke the authority granted by this order at any time at our discretion without hearing;
7. To the extent not granted, we deny all requests in the captioned docket; and

8. We will serve a copy of this order on US Airways, Inc.; Delta Air Lines, Inc.; Lufthansa German Airlines; and Alitalia-Linee Aeree Italiane-S.p.A; the U.S. Department of State (Office of Aviation Negotiations); the Ambassador of Israel in Washington, DC; and the Federal Aviation Administration.

By:

SUSAN McDERMOTT
Deputy Assistant Secretary for
Aviation and International Affairs

(SEAL)

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U.S. Carrier Exemption Conditions

In the conduct of the operations authorized, the U.S. carrier applicant(s) shall:

- (1) Hold at all times effective operating authority from the government of each country served;
- (2) Comply with applicable requirements concerning oversales contained in 14 CFR 250 (for scheduled operations, if authorized);
- (3) Comply with the requirements for reporting data contained in 14 CFR 241;
- (4) Comply with requirements for minimum insurance coverage, and for certifying that coverage to the Department, contained in 14 CFR 205;
- (5) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (6) Comply with all applicable requirements of the Federal Aviation Administration and with all applicable U.S. Government requirements concerning security, including, but not limited to, 49 CFR Part 1544. To assure compliance with all applicable U.S. Government requirements concerning security, the holder shall, before commencing any new service (including charter flights) to or from a foreign airport, contact its International Principal Security Inspector (IPSI) to advise the IPSI of its plans and to find out whether the Transportation Security Administration has determined that security is adequate to allow such airport(s) to be served; and
- (7) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department of Transportation, with all applicable orders and regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

The authority granted shall be effective only during the period when the holder is in compliance with the conditions imposed above.